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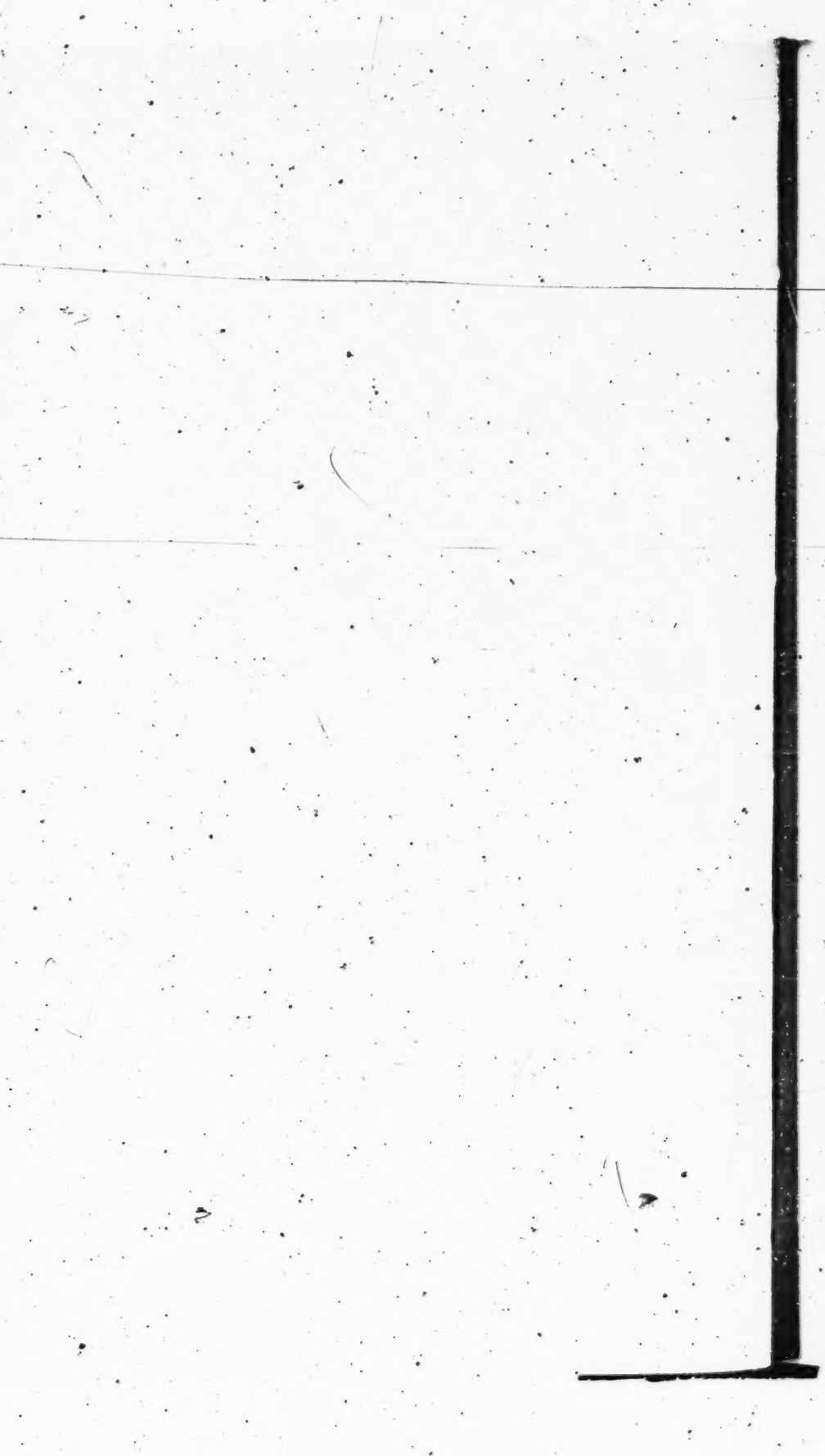

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 793

L. P. STEUART & BRO., INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 59–62) is not yet officially reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 66–71) is reported in 140 F. (2d) 703.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 18, 1944 (R. 71–72). The petition for a writ of certiorari was filed in this Court on March 15, 1944. Certiorari was granted on April 3, 1944.

Jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the power granted the President by Section 2 (a) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by Title III of the Second War Powers Act (Act of March 27, 1942), to allocate materials "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense," includes the power to limit or withdraw an allocation of a dealer in rationed commodities because he has violated the conditions upon which he was permitted to participate in the allocation system.

STATUTES AND REGULATIONS INVOLVED

The case involves the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176, 50 U. S. C. (Supp. II), sec. 631 et seq.). Section 2 (a) (2) reads, in part (the italicized words having been added by the Second War Powers Act):

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any

material *or of any facilities* for defense or for private account or for export, the President may allocate such material *or facilities* in such manner, *upon such conditions* and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

Sections 2 (a) (5) and (6) of the Second War Powers Act added provisions for criminal and civil enforcement suits against persons violating the Act or regulations and orders issued thereunder. Section 2 (a) (8) authorizes the President to exercise his powers through such agency or officer as he may direct and in conformity with rules which he may prescribe.

Ration Order No. 11, effective October 22, 1942 (7 Fed. Reg. 8480–8503, as amended), provided for the rationing of fuel oil. Section 1394.5707 required a dealer to surrender ration coupons or other ration evidence within five days after receiving a transfer from his supplier.[1] Section 1394.5652 required the receipt of valid ration evidence by a dealer delivering fuel oil to a consumer. Section 1394.5656 required the dealer to keep certain records of fuel-oil sales. Section 1394.5803 provided:

[1] "Ration evidence" means a token authorized by the Office of Price Administration to represent a right to receive a transfer of a rationed good and exchangeable for such good subject to the conditions set forth in the Ration Order. For the five-day period, see 8 Fed. Reg. 1640; cf. id. 14817.

Suspension orders.—Any person who violates Ration Order No. 11 may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security.[2]

By Executive Order 9125, dated April 7, 1942 (7 Fed. Reg. 2719–2720) the President had conferred his power under Section 2 (a) (2) of the Second War Powers Act on the War Production Board and confirmed War Production Board Directive No. 1 of January 24, 1942 (7 Fed. Reg. 562) which lodged in the Office of Price Administration certain of the Board's allocation power under the earlier acts. By Supplementary Directive 1–0 of October 16, 1942, the War Production Board had delegated to the Office of Price Administration specific authority over the rationing of fuel oil (7 Fed. Reg. 8418).[3] Ration Order No. 11 was then promulgated.

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[2] Effective March 2, 1943, this section was amended to read: "An administrative suspension order may be obtained in accordance with Procedural Regulation No. 4 against any person who violates Ration Order No. 11" (8 Fed. Reg. 2720).

[3] War Production Board Directive No. 1 contained the following provision: "The authority of the Office of Price

The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order No. 46 (8 Fed. Reg. 1771). At the same time it adopted procedural regulations governing their issuance. Procedural Regulation No. 4 (8 Fed. Reg. 1744).[4]

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the District of Columbia which affirmed the judgment of the district court (R. 62) granting respondents' motion for summary judgment, denying petitioner's motion for temporary injunction, and dismissing its complaint.

On January 7, 1944, the petitioner brought suit in the district court to enjoin enforcement of a suspension order issued by the Office of Price

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Administration under this Directive shall include the power to regulate or prohibit the sale, transfer or other disposition of products to any retailer who has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration hereunder, and shall include the power to regulate or prohibit the sale, transfer or other disposition of products to any wholesaler or other supplier of any retailer, directly or indirectly, if such wholesaler or other supplier has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration hereunder." A similar provision was contained in Supplementary Directive No. 1-0, dealing specifically with fuel oil.

[4] Procedural Regulation No. 4 was replaced by Revised Procedural Regulation No. 4 (9 Fed. Reg. 2558), effective April 1, 1944.

Administration on December 31, 1943, restricting the petitioner's dealings in fuel oil. Petitioner is a retail dealer in various kinds of fuel oil in the District of Columbia. On August 9, 1943, the Office of Price Administration commenced proceedings, under Procedural Regulation No. 4, to determine whether a suspension order should be issued against petitioner. A Notice of Hearing was served charging 227 violations of Ration Order No. 11 (R. 23). Pursuant to the Notice, a hearing was held on these charges before a Hearing Commissioner, terminating on October 22, 1943. On November 8, 1943, the Hearing Commissioner issued a suspension order (R. 32). Both petitioner and the Enforcement Department appealed to the Hearing Administrator from the terms of this suspension. On December 31, 1943, after full argument and review, the Hearing Administrator issued his Decision on Appeal (R. 41). As the Court of Appeals noted (R. 67), petitioner's complaint does not deny that the evidence supported the findings of the Hearing Administrator. These findings must therefore be accepted as true.

The Hearing Administrator found that the petitioner had received transfers of 5,548,972 gallons of fuel oil without surrendering in exchange to its supplier, Petrol Corporation, any ration coupons, exchange certificates, or any other form of ration evidence (R. 43–44). This was clearly con-

trary to Ration Order No. 11, which required surrender of such evidence promptly.[5] It was not a question of delay; petitioner had never surrendered such coupons. In addition, the Hearing Administrator determined that upon comparison of all available counts of the coupons received by petitioner and the sales made by it, a shortage of coupons appeared representing approximately 181,000 gallons, according to the petitioner's own calculation, and 328,640 gallons according to the Office of Price Administration's count, which showed that petitioner had not always received coupons in exchange for fuel oil delivered to its customers (R. 45–47).[6] He likewise found at least 13 specific instances admitted or proved, where petitioner failed to receive valid ration coupons in exchange for fuel oil delivered (R. 47–48). Finally, the Hearing Administrator determined that the petitioner had failed to keep records showing the number and value of all coupons detached and received for fuel oil transferred to consumers (R. 48).[7] At the time of these violations petitioner was attempting to serve a greatly enlarged list of customers, many of them evidently drawn from other dealers who lacked fuel oil supplies (R. 43). The Administrator determined that because of the demonstrated

[5] Section 1394.5707.

[6] This was contrary to Section 1394.5652 of Ration Order No. 11.

[7] This was in violation of Sec. 1394.5656 of the Ration Order.

untrustforthiness or inability of petitioner to comply with the regulations while serving additional customers, a suspension order should issue. (R. 50).

The suspension order (R. 50–51) prohibited the petitioner from receiving fuel oil for resale or transfer to any consumer, and from transferring fuel oil to any consumer, from January 15, 1944, to December 31, 1944,[8] but provided that if the petitioner should furnish to the Office of Price Administration a list of consumers to whom it sold fuel oil from October 21, 1941, to October 21, 1942, and if it should surrender all void ration evidences in its possession, it might continue to receive deliveries of fuel oil sufficient for purposes of resale and transfer to consumers serviced by it between October 21, 1941, and October 21, 1942.[9] The suspension order further provided for an accounting by petitioner of its fuel oil transactions. Finally, in paragraph (c), the order provided that if the Petroleum Administrator for War should certify to the Office of Price Administration that the fuel oil needs of the District of Columbia cannot be met by the supplies and facilities of other dealers and suppliers in the area, and that it is therefore essential to the welfare of the community that the provisions of the

[8] The Second War Powers Act expires on December 31, 1944.

[9] Ration Order No. 11 became effective October 22, 1942.

suspension be modified, the restrictions imposed might be modified by the Hearing Commissioner on the petition of the District Director of the Office of Price Administration and the petitioner. The suspension order does not prevent the petitioner from leasing or selling any excess storage or other facilities it may own. (Cf. petitioner's brief, p. 8).[10]

The instant suit came on for hearing in the district court, after respondents had filed an answer (R. 56), on petitioner's motion for a temporary injunction. All parties agreed that the case was controlled by issues of law and consented to disposition of the suit on oral motions of petitioner and respondents for summary judgment (R. 62). The district court ordered the complaint dismissed (R. 62), with an opinion holding that authority to issue the suspension order is included in the statutory power to make allocations (R. 59–62). The Court of Appeals unanimously affirmed (R. 67–71). A restrain-

[10] Although petitioner claims it made a large investment in additional facilities prior to the heating season of 1942–1943 (R. 2), according to its own declaration its fuel oil storage capacity at the end of the season was only 16,850 gallons (R. 42). Petrol Corporation, prior to its suspension for violations, including sales to petitioner without coupons, had a storage capacity in Washington of at least 3,405,810 gallons (R. 42). Petitioner did not contend, and we are confident was not able to contend, that these facilities have been idle.

ing order has been continued pending final disposition of the case.

SUMMARY OF ARGUMENT

1. The Second War Powers Act confers on the President, or the agencies designated by him, power to "allocate" materials in such manner and upon such conditions as are deemed necessary or appropriate in the public interest and to promote the national defense. This power includes the power to withdraw allocations and to condition the participation in the distribution of rationed commodities upon evidence of trustworthiness as shown by conformity to the applicable rationing regulation. Ration Order No. 11, here involved, specifically establishes obedience to rationing rules as a condition of continued participation; it provides for suspension orders of the type here in question. It cannot be supposed that Congress intended to exclude this feature in the establishment and operation of a rationing system. So to conclude would be to impute to Congress a mandate that critical materials must be furnished equally to those who have shown flagrant irresponsibility in the distribution or use of such commodities.

The various agencies to which the allocation power has been delegated have regarded the power as including authority to issue suspension orders, and these have in fact been issued in

several thousands of instances. The courts with virtual unanimity have sustained the power.

In establishing a rationing system pursuant to the statute, the administrative agencies might have limited the function of distribution to those who had already demonstrated their responsibility and competence to observe the rationing rules. Instead, the Government has authorized the use of existing distribution channels, but has conditioned the continuance of distribution upon compliance with the rules. Such a condition, established pursuant to express statutory authority to impose conditions, could hardly be more germane. No question is presented of the power to impose conditions unrelated to the safeguarding of the rationing process itself.

Petitioner's argument is largely based on the premise that it is necessary to imply the power to issue suspension orders, and it is further argued that these orders are "penal" and hence the authority may not readily be implied. In fact, however, since the issuance of such orders is an integral part of the allocation process itself, constituting as they do a reallocation, the power is expressly granted, and it is the exclusion of the power which would have to be implied. Moreover, the characterization of the power as penal is not a fruitful method of resolving the question of statutory construction. If the test has any relevance, the order here involved is not penal

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under the standards which have been applied in cases dealing with the suspension of members of learned professions or licensed occupations, where the suspension is based on past misconduct showing unfitness for the particular occupation. In the present case petitioner, by its flagrant violation of the regulations while serving an abnormally large clientele, has shown that to safeguard the rationing process, it may not safely be entrusted with the same responsibility under the same conditions.

2. Congress has been fully informed of the construction of the law and the administrative practice and, in the light of this knowledge, has reenacted the relevant provisions and approved that construction and practice. In enacting the Second War Powers Act of 1942, Congress was informed of the suspension power exercised by the War Production Board under the provisions of the Priorities and Allocations Act of 1941; Congress reenacted those provisions and strengthened them, adding criminal and civil enforcement measures, but not supplanting the suspension power. Subsequently the Federal Reports Act of 1942 forbade the withdrawal of an allocation for failure to furnish information, except where the allocation was legally conditioned on facts which would be revealed by the information requested and refused. This provision constituted a recognition and acceptance of suspension orders except in the area of the prohibition, and

showed also that Congress was able to find apt words to forbid such orders in those instances where it so desired.

ARGUMENT

THE SUSPENSION ORDER IS A VALID EXERCISE OF THE ALLOCATION POWER CONFERRED BY CONGRESS

A. *The suspension order has been authorized by Congress*

1. *The statutory power.*—In the Priorities and Allocations Act of May 31, 1941, confirmed and strengthened by the Second War Powers Act of March 27, 1942, Congress conferred broad power on the President, and agencies designated by him, to establish a system of allocation and priorities. The question here presented is whether that power to "allocate * * * in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense" (*supra*, pp. 2–3) includes the power to issue a so-called suspension order such as that here involved. It is our position that the power granted necessarily includes the power to withdraw an allocation from one who has abused the grant, and to condition the continued participation in the distribution of rationed commodities upon evidence of trustworthiness as shown by conformity to the requirements of the system. A contrary view would indeed be a surprising construction of the

authority and responsibility which the statute conferred. It would mean that the agency responsible for allocation would be obliged to disregard even wanton misuse of critical materials or reckless distribution of them in violation of the system of controls which had been established. That Congress so intended the allocation system to be managed is hardly credible. If it be suggested that the sole recourse in the case of irresponsible participants in the rationing system was intended to be the bringing of criminal and civil suits, the answer is twofold. In the first place, until the enactment of the Second War Powers Act such enforcement measures were not expressly provided, and it cannot be argued that the power to issue suspension orders, though granted in the earlier statute, was withdrawn by implication in the later one;[11] indeed, the Second War Powers Act strengthened the power of allocation by adding the phrase "upon such conditions" in defining the President's power. In the second place, civil and criminal enforcement suits do not discharge the primary responsibility, in administering the rationing process itself, of safeguarding the supply of critical materials through a just, equitable, and reliable system of allocation.

[11] As is shown *infra*, pp. 43–48, the addition of the enforcement measures in the Second War Powers Act was not in substitution for the power of suspension, which was expressly brought to the attention of Congress, but was designed to furnish more comprehensive means of securing compliance.

The issuance of suspension orders has been regarded as an integral part of a system of allocation by the several agencies to which the allocation power in various aspects has been delegated. The War Production Board, the Petroleum Administration for War, the War Food Administration, and the Office of Price Administration all issue such orders. As of March 20, 1944, the War Production Board had issued 512 suspension orders. As of March 1, 1944, the Office of Price Administration had issued 9,007 suspension orders, and had dismissed 1,268 proceedings, while 2,477 proceedings were pending. As early as its Second Quarterly Report to Congress, for the period May 1 to July 31, 1942, the Office of Price Administration pointed out that in that relatively early period 122 suspension orders had been issued. The report stated: "Experience has emphasized the fairness, adaptability, and effectiveness of the suspension order proceeding, and it will be increasingly used." (H. Doc. No. 891, 77th Cong., 2d sess., pp. 83–84.) A more detailed consideration of the issuance of suspension orders, as that practice has been brought to the attention of Congress, will be found in the discussion, *infra*, pp. 43–57, relating to congressional approval and ratification of the practice.

Not only the administrative agencies, but the courts as well, have regarded the power granted by Congress as including the power to issue sus-

pension orders. The decision of the Court of Appeals in the instant case upholding the suspension order as a valid exercise of the allocation power and its like holding in another case [12] are in accord with the only other appellate decision, that of the Circuit Court of Appeals for the Fifth Circuit.[13] Twelve United States District Judges in ten Districts have likewise sustained Office of Price Administration suspension orders.[14] With the exception of the opinions of the District Judge whose decision was reversed by the Circuit Court of Appeals for the Fifth Circuit,[15] there is but one

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[12] *Country Garden Markets* v. *Bowles*, App. D. C., Mar. 6, 1944, not yet reported.

[13] *Brown* v. *Wilemon*, 139 F. (2d) 730 (C. C. A. 5), pending on petition for ceritorari, No. 854, present Term.

[14] *Perkins* v. *Brown*, 53 F. Supp. 176 (S. D. Ga.); *Panteleo* v. *Brown*, 53 F. Supp. 209 (S. D. N. Y.); *Joliet Oil Corp.* v. *Brown*, N. D. Ill., Dec. 17, 1943, not yet reported; *Gallagher Steak House* v. *Bowles*, S. D. N. Y., Dec. 23, 1943, not yet reported; *Kotsos* v. *Ivins*, D. Utah, Jan. 12, 1944; *Arthur L. Means* v. *Bowles*, D. R. I., Jan. 17, 1944; *L. P. Steuart & Bros.* v. *Bowles*, D. D. C., Jan. 21, 1944, not yet reported; *Country Garden Markets* v. *Bowles*, D. D. C., Jan. 24, 1944, not yet reported; *Waldera et al.* v. *Bowles*, D. N. D., Jan. 25, 1944; *Lineburger* v. *Manierre et al.*, S. D. Ia., Mar. 20, 1944; *Central West Oil Co.* v. *Bowles*, W. D. Mich., April 4, 1944, not yet reported; *La Porte et al.* v. *Bitker et al.*, E. D. Wis., April 4, 1944, not yet reported.

[15] Prior to reversal of the decision in *Wilemon* v. *Brown*, 51 F. Supp. 978 (N. D. Tex.), Judge Atwell had also decided *Jacobson* v. *Bowles*, 53 F. Supp. 532, which is now pending on appeal.

case which may be considered to the contrary, and that by way of a dictum or alternative holding.[16]

These decisions have construed the language of the Second War Powers Act in a manner benefitting its vital purposes. The duty of controlling shortages and preserving essential goods in wartime, through a system of allocation, marks this statute as one of the great remedial measures of recent years. Its contemporaneous construction by the agencies charged with its administration is, of course, entitled to great weight. *Adams* v. *United States,* 319 U. S. 312; *White* v. *Winchester Country Club,* 315 U. S. 32, 41; *United States* v. *American Trucking Associations,* 310 U. S. 534. As we shall show in a later connection, the Office of Production Management, and its successor, the War Production Board, from the outset construed the statute to authorize suspension orders, and specifically included the suspension order power in its delegation of authority to the Office of Price Administration by War Production Board Directive No. 1. Not only was the construction "contemporaneous," but the statutory provisions had been suggested by the Office of Production Management and in-

[16] *Sims* v. *Talbert,* 52 F. Supp. 688 (E. D. S. C.); *B. Simon Hardware Co.* v. *Nelson,* 52 F. Supp. 474 (D. D. C.), involving a War Production suspension order, is a decision of Mr. Justice Bailey which, in upholding the suspension order in the present case, he termed inapplicable. The decisions are being appealed.

troduced at that agency's request by Representative Vinson.[17] To construe the statute as excluding the power would very seriously impair its effectiveness. Were the question more doubtful than it is, such a construction would on that ground be avoided. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 392; *Armstrong Paint and Varnish Works* v. *Nu-Enamel Corp.,* 305 U. S. 315, 333.

In order to indicate more fully the integral place of suspension orders in the process of allocation, we turn to a consideration of the problem of allocation and the plan adopted to deal with the problem.

2. *The problem of equitable allocation in the wartime economy.*—Allocation is a process of choosing, limiting and withholding. The armed forces are constantly in need of critical commodities like petroleum. What is left for civilians is often less than a bare essential minimum. It is consequently necessary to allocate the limited supply wisely so as to assure an adequate flow of shortage materials to the armed forces, to our allies, and to the home front. In choosing among those clamoring for supplies, it may be essential to limit the availability of certain goods to persons with urgent claims because others must utilize the materials for still more pressing pur-

[17] Hearing on H. R. 4534 before Senate Committee on Military Affairs, 77th Cong., 1st. sess., May 14, 1941, p. 55.

poses. It is often imperative to withdraw or reclaim allocations granted, to reallocate, because of a changed military situation or a change in legitimate consumer demands. In making these vital allocations and reallocations, the War Production Board has played perhaps the most prominent role, exercising the allocation power through a wide variety of orders, in large measure to control basic industry. It has issued, among others, Materials Orders, Limitation and Conservation Orders, and Suspension Orders. The allocation power has also been exercised through delegation from the President or the War Production Board, or both, by the War Food Administration, the Petroleum Administration for War and the Office of Price Administration, all of which have issued suspension orders of the general type herein involved. Allocation by the Office of Price Administration is called rationing, that being simply another name for the same power.

The allocation and rationing of fuel oil is carried on jointly by the Petroleum Administration for War [18] and the Office of Price Administration, both imposing various restrictions and conditions in fulfilling their roles. The Office of Price Administration under War Production Board Directives 1 and 1-0, *supra*, p. 4, the latter dealing specifically with fuel oil, is

[18] The Petroleum Administration for War was established by Executive Order 9276 (7 Fed. Reg. 10091).

authorized to require any person who is involved in any stage of distribution of fuel oil to comply with its regulations. The Petroleum Administrator, under Executive Order 9276 (7 Fed. Reg. 10091), has the duty to conserve petroleum products, and, subject to the direction of the Chairman of the War Production Board, has the primary responsibility of maintaining an adequate supply throughout the distributing system. The Petroleum Administration for War is guided in providing for the physical flow of fuel oil into the rationed areas by the pattern of rationed demand as shown by the return flow of coupons. The Office of Price Administration exercises the rationing function, including complete control over the flow of coupons from consumer to dealer to supplier. It establishes the rules for guidance of dealers and suppliers in their role as distributing agents under the rationing system. Only through the maintenance of such control is it possible to enforce consumer rationing and equate the rationed demand with the supply as determined by the Petroleum Administration.

The importance of permitting every consumer to obtain his just share of the residual stock pile of critical materials like fuel oil is apparent. The public welfare requires an equitable system of allocation so as to avoid wasteful consumption by some while others are prevented from satisfying their basic needs. It was therefore incum-

bent on the Government to search for an equitable allocation plan which would enable it to effectuate the objects of the Act and comply with its standards by rationing materials in such manner, upon such conditions and to such extent as are necessary or appropriate in the public interest and to promote the national defense.

3. *The allocation plan adopted and the place of suspension orders therein.*—To achieve these statutory objectives the Government might have established initial tests requiring demonstration of complete responsibility, trustworthiness, comprehension of the ration rules, and proof of an organization adequate to operate within the ration system. This plan was scarcely feasible, considering the vastness of the project. The system would have amounted to a virtual designation of Government-approved outlets, the dealers becoming in a sense agents or designees of the Government in distribution of rationed goods. The Government instead has authorized use of all existing distribution channels, but has imposed a system of control to prevent waste, diversion, and injustice. The plan adopted permits all trustworthy persons to deal in rationed goods. It assumes, as an initial matter, that all persons are trustworthy and will carry out their duties in a zealous and diligent fashion. But the Government is aware of its duty to assure every consumer his just share of scarce and vital commodities.

Therefore the plan adopted permits dealers to act as distributing agents only so long as they continue to meet the conditions of eligibility set up in the initial allocation. This means that when the Government determines that a person does not meet the conditions of trustworthiness and responsibility essential for the protection of the public interest it may allocate away from the distributor, or in other words reallocate to others who are more likely to see that the flow to consumers is not diverted. A very pragmatic test of continuing eligibility has been adopted, and one least subject to abuse. The test is whether the dealer has been abiding by the rationing rules or has been violating them. Violation is indicative of the conduct that may be expected in the future in the absence of a reallocation or suspension order."

Viewed in another way, the requirement of compliance with ration rules is the "manner" or a "condition" of allocation. The power granted to impose conditions upon an allocation is not, of course, unlimited. The condition must be in the public interest and promote the national defense;

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[19] The Office of Price Administration has assigned to the Hearing Administrator and Hearing Commissioners this task of determining eligibility. These officers, divorced from the enforcement function, are a guarantee of impartial administrative treatment. No challenge in any respect has been made in this case to the fairness and fullness of the administrative procedure.

it must be germane; it must effectuate the allocation function. The elimination of untrustworthy persons as dealers in scarce commodities assuredly has such an effect. Likewise the restriction of petitioner, who flagrantly and continuously violated the rationing rules throughout the period of investigation, to its customers in the prerationing year, so that its desire for expansion at the expense of ration controls may be stemmed, is appropriate." The Office of Price Administration might well be considered derelict in its duty if it did not issue such protective orders."

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[20] Petitioner asserts (Br. p. 19) that if "the violations had been substantial, supportable by legal evidence and of a nature likely to recur", an injunction would have been the logical remedy. The assumption seems to be that these elements were not present. However, petitioner did not challenge the administrative decision as being unsupported in evidence. The Hearing Administrator found flagrant and substantial violations. He further found that the customers it served in the prerationing year approached the upper limit of its capacity to serve while complying with the ration rules (R. 49, 50). "Additional customers, then, clearly impose a burden which the respondent cannot bear" (R. 50).

[21] It becomes increasingly clear that there is no need to imply power to suspend, the suspension order in this case being an appropriate order under the allocation power. Petitioner's assertion (Petitioner's Brief, p. 30) that it is necessary for the Government to show that the allocation power includes power to buy and sell, or that fuel-oil dealers are licensees, is unwarranted.

As to the power to buy and sell, the petitioner concludes that the Government is urging that it possesses such power under the allocation authority. The Government takes no

4. *The remedial nature of the suspension order.*—We have seen that the allocation power includes the power to withdraw or suspend an allotment. This is supported in part by the consideration that a broad construction of the allocation power is appropriate, as petitioner itself concedes

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such position. It has suggested that completely regulated and approved Government outlets to eliminate initially untrustworthy dealers might have been used, if feasible, as an alternative to the present method of controlling eligibility. That does not mean that the Government would be forced to buy and sell, any more so than refusal to permit sale of tobacco, which has not been inspected and approved by Government representatives, in certain markets requires obtaining title. See Tobacco Inspection Act of 1935, 7 U. S. C. 511d. The language cited by petitioner as appearing on p. 29 of the Administrator's brief in the *Wilemon* case (Petitioner's Brief, p. 29) is not quoted in its context. On p. 28, the Administrator made it clear that the power to withdraw an allotment is included by its very nature in the power to allocate. However, stated the Administrator, *even if* the power had not been expressly given it can reasonably be implied. The Government is not required to show that fuel-oil dealers are licensees. Whether dealing in rationed commodities be termed a privilege or a conditional right, the petitioner is in any event subject to regulation. The important fact is that the terms of the suspension order are properly related to the carrying out of the allocation power. Some courts have noted that an allocation on condition is similar to a license or privilege in which rights do not vest. Thus the Court in *Perkins* v. *Brown*, *supra*, note 14, observed, 53 F. Supp. at p. 179:

> The suspension order is itself an allocation. Rationed commodities are allocated away from the violator for a period deemed reasonable under the circumstances, and at the same time the amount actually or potentially allocable to other and more trustworthy recipients of

(Brief, p. 31). The administrative construction of the statute and the legislative history, discussed *infra,* pp. 43–57, further show that the power to suspend is authorized. There is no need then to imply the power. The question is not whether the suspension order power should be *implied,* but whether the granted power to limit or withdraw allocations on condition should, *by implication, be limited* so as to exclude the exercise of such power when the condition is failure to observe the rationing regulation.

But petitioner has based its entire argument on the asserted need for resorting to an implied power. Petitioner argues that a rule of strict construction requires that penal power should not be read into the statute, though adopting the view urged by the Government in the courts be-

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rationed commodities has been increased. A distributor of gasoline may be likened to a licensee whose license runs during good behavior.

It is improper to say that the lower court cases can be characterized as upholding suspension orders on the licensing theory. Thus the Circuit Court of Appeals for the Fifth Circuit stated in the *Wilemon* case, *supra*, note 13, 136 F. (2d) at p. 732:

> We do not think a penalty has been ordained or adjudged in such a sense as to require the action of Congress and a court; but that observance of rationing rules may as a matter of administration be made "a condition" of participation in allocation, as mentioned in the Act * * *.

Finally, the Government does not propose to argue in this case the validity of suspension orders entered because of a price overcharge for a rationed commodity. The short answer is that such an order is not involved here.

low that the various possible legal significations of the term "penalty" have not been definitively settled. Petitioner thus desires that questions as to the existence of important wartime powers be determined on the basis of a term of characterization which has no certain meaning and which could have significance in this case, if at all, only if the issue were one as to implication of the authority to suspend. What is more, petitioner offers no formula indicating what it regards as those legal incidents which would characterize a provision as a penalty and would consequently prevent the implication of such a penalty power under strict rules of construction."[22] Nor does petitioner suggest that any such formulation of the term penalty would differ from the formula applied in other cases (see pp. 28–30, *infra*) where the characterization of regulation of a trade or profession as penal or remedial was important.

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[22] Petitioner suggests (Br. p. 23) that any "sanction" is penal by the very definition of the former term. But cf. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, where the question presented was one of construction of the statutory provision (29 U. S. C. § 160) authorizing the Board to award back pay and make other affirmative orders. In approving of an award of back pay and a requirement that the company return certain dues collected by its union, the Court stated (p. 477): "The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees." Petitioner suggests no formulation of what is a sanction, other than that it is penal.

We think that the question in the present case cannot profitably be approached by introducing the concept of "penalty" as a test and then endeavoring to define the concept. Since, however, most of petitioner's argument proceeds on this course, we shall briefly consider the authorities and their relevance in the light of the actual administration of the allocation authority through suspension orders.

That a statute is burdensome or has "drastic consequences" (see Pet. Brief, p. 23) will not prevent the Court from construing it liberally when that is deemed in the public interest. *Baltimore & Philadelphia Steamboat Co.* v. *Norton,* 284 U. S. 408; *Alpha S. S. Corp.* v. *Cain,* 281 U. S. 642. Even a statute imposing a civil penalty will be liberally construed to carry out its intent. Thus legislation imposing a fine of $1.00 a head for pasturing "cattle" on Indian land was held to forbid the pasturing of sheep as well, since such a construction would most fully promote the policy and objects of the Legislature. *Ash Sheep Co.* v. *United States,* 252 U. S. 159. The subordinate role played by the remedial-penal concept becomes apparent.

Both in the court below and here petitioner has relied on *Cummings* v. *Missouri,* 4 Wall. 277, and *Ex parte Garland,* 4 Wall. 333, cases involving statutes imposing qualifications for office which were held to be additional punishment violative

of the constitutional prohibition against *ex post facto* laws. *Hawker* v. *New York*, 170 U. S. 189, established that a statute which forbade persons convicted of a felony from practicing medicine did not increase the punishment for an offense already committed. The Court held that the statute merely prescribed a qualification for practice of the profession for the protection of the public.[23] The Court rejected the applicability of *Ex parte Garland*, 4 Wall. 333, and *Cummings* v. *Missouri*, 4 Wall. 277, relied on by petitioner (Brief, pp. 21, 22), noting that those cases held unlawful test oaths as to past conduct respecting matters which had no connection with the profession of an attorney or a minister from which the parties in the respective cases would be barred.

It is to be noted that the Court in the *Hawker* case decided that the restriction on the practice of medicine was protective. If it had deemed it to be punishment, civil or criminal, its holding would have been otherwise. The Court did not hold that the statute imposed a retroactive *civil* punishment, which was not violative of Constitu-

[23] The Court stated, at p. 196:

> That the form in which the legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be deemed of such bad character as to be unfit to practice medicine * * *.

tional prohibitions. Such a holding would seem unwarranted. Rather the Court flatly held no punishment was contemplated. This test of inflicting a loss for the purpose of punishing an offense, as opposed to establishing reasonable qualifications or restrictions for proper fulfillment of a responsible wartime distribution service, we submit, is the legitimate distinction for any relevant purpose between penal and remedial action in the instant case.[24]

Wright v. *Securities and Exchange Commission,* 112 F. (2d) 89 (C. C. A. 2d), involved the provision of the Securities and Exchange Act[25] authorizing the Commission, if in its opinion such action is necessary or appropriate for the protection of investors, to suspend or expel any member of an exchange who had violated any provision of the Act. The issue was one of degree of proof; the court did not place its decision on the ground that suspension was merely a civil penalty. Rather the court stated (at p. 94):

> In considering the order of expulsion as a punishment for past offenses the petitioner is in error. Section 19 (a) (3),

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[24] *Champlin Ref. Co.* v. *Corporation Commission,* 286 U. S. 210, cited by Petitioner (Brief, pp. 23, 24), is factually unlike the instant case. The decision can be said to turn not on the "drastic consequences" of receivership but on the court's determination that receivership was imposed for the purpose of punishment.

[25] 15 U. S. C. 78s (a) (3).

> 15 U. S. C. A. § 78s(a) (3), authorizes an order of expulsion not as a penalty but as a means of protecting investors, if in the Commission's opinion such action is necessary or appropriate to that end. Since the purpose of the order is remedial, not penal, there is no basis for the contention that Wright's violation of the statute must be proved beyond a reasonable doubt.

Nichols & Company v. *Secretary of Agriculture,* 131 F. (2d) 651, (C. C. A. 1st), involved a 90-day suspension of a commission merchant under the Commodity Exchange Act for a past violation of the statute. The issue was one of construction of the law. In this connection the court stated, at p. 659:

> We believe that suspension of a registrant is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act.

See also *Nelson* v. *Secretary of Agriculture,* 133 F. (2d) 453, 456–7 (C. C. A. 7th).

Wallace v. *Cutten,* 298 U. S. 229 (Pet. Br., p. 24), is in no way opposed to the position urged here. That case involved proceedings brought under Section 6 (b) of the Grain Futures Act by the Secretary of Agriculture to suspend a member of the Chicago Board of Trade. The

Secretary was empowered to institute such proceedings if he had reason to believe any person "is violating" any provision of the Act or regulations issued thereunder. Proceedings were commenced in 1934 before a commission named in the Act against Cutten to determine whether his trading privileges should be suspended for acts committed in 1930 and 1931. Cutten's motion to quash, on the ground that Section 6 (b) empowered the commission to act only against persons presently committing offenses, was denied by the Board but sustained on appeal by the Circuit Court of Appeals. This Court affirmed, on May 18, 1936, holding that the language used permitted suspension only for present violations. On June 15, 1936, one month later, the Grain Futures Act was amended. Its short title was changed to the "Commodity Exchange Act." Section 6 (b)[*] was altered to permit suspension of a person who "is violating" or "has violated" the Act or regulations. The Section, as amended, was construed in *Nichols & Company* v. *Secretary of Agriculture, supra,* and *Nelson* v. *Secretary of Agriculture, supra,* as providing for a suspension order that was remedial and not punitive. These cases involved past offenses. *Wallace* v. *Cutten* therefore simply stands for the proposition that the language used necessitated present violations to

[*] 7 U. S. C. 9.

justify suspension. The court had no occasion to determine whether suspension for past violations was a "penalty." The courts in the *Nichols* and *Nelson* cases have resolved that issue by rejecting the penalty argument.

The important consideration in this case is whether the instant order was imposed for the purpose of punishment or as a safeguard to the rationing system. A blanket review of Procedural Regulation No. 4, as attempted by petitioner in its brief, is not helpful. The considertions suggested by petitioner (Brief, p. 17) show that every procedural safeguard of its rights was employed and not that a punishment was inflicted. Any order under Procedural Regulation No. 4 which is not germane to the allocation function and which is not in the public interest would be invalid.

It should be emphasized that the actual administration of the present suspension authority demonstrates that it is used in a remedial fashion to effectuate the allocation program, and not as a penalty for punishment of transgressors. Thus the Hearing Commissioners and the Hearing Administrator consider the effect the suspension order will have upon the community at large, and if they determine that the net result of respondent's suspension will be harmful to the locality, they decline to allocate away from the violator,

because such an allocation would not be appropriate in the public interest."

In *Matter of Petrol Corporation,* Docket No. 2–58A, October 14, 1943, the Hearing Administrator reviewed the theory governing the practical administration of the suspension power. His language is significant:

> * * * The power to allocate involves either a withholding or a grant. They are different sides of the same shield. The term allocation involves the idea of conscious choice—otherwise it is not allocation being exercised but rather an automatic grant to all. We cannot conceive that a nation in the extreme emergency of war is powerless to conserve and safeguard its slender stock of critical materials. We cannot conceive that our nation, so threatened, may not, in its distribution of such scarce commodities, choose between the worthy and the unworthy, between the trustworthy and the wasteful, allocating to each in proportion to his ability to guard, conserve, and wisely distribute. For most

[11] *Matter of Tramore Cafeteria, Inc.*, Docket No. 4–18A, July 27, 1943; *Matter of James C. Sylvia & John B. Morse*, Docket Nos. R1–S806, R1–S807, Hearing Commissioner, Region I, October 20, 1943; *Matter of Dr. M. A. Kugel*, Docket No. 4–479, Chief Hearing Commissioner, Region IV, October 5, 1943; *Matter of M. V. Wallace, d/b/a Midway Grocery & Everfresh Market*, Docket No. 8410–21473, September 20, 1943; *Matter of L. H. Godwin, d/b/a Godwin's*, Docket No. 4–682, Chief Hearing Commissioner, Region IV, November 4, 1943.

there will be no restrictions beyond those imposed by the general ration order itself. Indeed the plan of rationing adopted by this country presupposes equal trustworthiness in all and permits equal participation, initially, in handling of scarce commodities. It is only after demonstrated unworthiness or inability that the burden is lessened to that which may safely be borne. In some extreme cases of wanton indifference or malevolent design it may be (and has been) determined that for the duration of the war such individuals should not again be trusted with scarce commodities. For others, those who have been careless, or to some extent indifferent or callous, a period of suspension of the privilege of handling the critically scarce commodity will serve the purpose of enabling the distributor to put his house in order, to set up a system of controls, to indoctrinate inefficient or careless help, and to make himself ready in all respects for a continued assumption of his duty of careful distribution. Such was the action taken by us in this case.

Suspension orders are not effective beyond the period during which the commodity involved is rationed. When coffee was withdrawn from the ration list, outstanding suspension orders were immediately lifted.[28] This was a clear recogni-

[28] See *Matter of Tramore Cafeteria, Inc.*, Docket No. 4–18A, Hearing Administrator, October 6, 1943. Although there had been violations of Ration Order No. 12, covering coffee,

tion that these orders are remedial in character and not a penalty imposed as punishment. Neither the revocation of fuel-oil rationing nor the repeal or expiration of the Second War Powers Act will cause remission of fines or termination of jail sentences imposed by the courts under Section 2 (a) (5) of the Act. These fines and prison sentences are penalties, and therefore have different legal incidents from those of allocation orders.

The suspension power is to be regarded as implementing the allocation process even though frequently the order issued is for a short period of time rather than for the duration of rationing. As noted in the *Petrol* proceedings, *supra*, persons who have not shown themselves completely irresponsible may take steps during the period of suspension to acquaint themselves and their employees with their duties under the Ration Order. Furthermore, the Hearing Commissioners and the Hearing Administrator take into consideration the harm to the individual of a long-term suspension, and, if the respondent is found

as well as of Ration Orders 3, 5, and 13, the Hearing Administrator stated he excluded coffee from the suspension order because, pending appeal, the commodity ceased to be rationed. On August 3, 1943, the Assistant General Counsel, in Charge of the Food Enforcement Branch, instructed all Office of Price Administration Regional Enforcement Attorneys to advise persons suspended for violations of coffee rationing that their suspensions were automatically terminated by the lifting of rationing.

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to be not entirely unsatisfactory as a distributing agent, the Office of Price Administration will take into account the probable improvement in compliance habits that may be expected from suspension for a short term.[29] The withdrawal of the authority to deal in the rationed commodity may therefore be for a limited period, with the thought that respondent will subsequently resume its distributing function as a diligent and responsible distributor.

The Administrator does not wish in any way to discount the important enforcement and compliance benefits stemming from suspension orders. These orders have deterrent effects not only upon the parties suspended but upon the entire trade (R. 69, 70). However, many other conditions imposed under the allocation power have like deterrent effects. Thus periodic tire inspection, including inspection of the serial number on the tire, as a condition for receiving gasoline rations, served the important function of preventing black market sale of new and recapped tires. So long as punishment is not the object, deterrent results stemming from the agency practice indicate its desirability.

The petitioner cannot rightfully challenge the remedial purpose of the suspension order issued

[29] See, e. g., *Matter of George Canaris and Mrs. Alba Acosta*, Docket No. 8230-2532, Hearing Commissioner, Region VIII, Aug. 21, 1943, where suspension was limited on the belief that the order would be enough to bring home the necessity for compliance.

by the Hearing Administrator in the instant case. Mr. Justice Bailey in the District Court ruled that the order was not imposed as a penalty or punishment for past conduct but for the protection of the public in the future. (R. 61),[39] The Court of Appeals expressed a like view (R. 69, 70). The petitioner has not challenged the suspension order as being unsupported by substantial evidence. A challenge now by the petitioner to the administrative order as being an unreasonable way to protect the public can hardly be made in the absence of an allegation in the complaint of lack of substantial evidence in the administrative record to support the kind of order entered. That record might well show that an unconditional suspension of petitioner as a fuel oil dealer for the duration of fuel oil rationing would also have been justified.

In paragraph nine of its Complaint (R. 10, 11) the petitioner alleged that it would suffer irreparable injury because of its restriction to sales to customers served by it between October 21, 1941, and October 21, 1942. It alleged that its records do not show the sales to cash customers. It further alleged a turn-over in customers each year, making it likely that some of its accounts of the prerationing period will have been obtained by others. It now seeks to use these allegations

[39] Mr. Justice Bailey held inapplicable his own ruling in *B. Simon Hardware* v. *Nelson*, 52 F. Supp. 474 (D. D. C.), a case involving a War Production Board suspension order.

to support a claim that the order goes beyond a remedial purpose and is therefore a penalty. (Brief, p. 20.) It did not, however, introduce the administrative record in the injunction proceedings or allege that the administrative transcript would show that petitioner has no record of its cash customers, or, at the very least, that it would not affirmatively show that such records exist. Actually the administrative record fully supports the kind of an order entered, since it showed that petitioner had a separate card in its files for each customer served, indicating whether the delivery man should leave fuel oil with the named consumer only upon payment of cash, showing the date and amount of each sale, and containing a secret code credit rating. Such information supports the Hearing Administrator's determination that the kind of order entered would return petitioner to approximately the kind of business it could responsibly handle. Furthermore, even assuming that petitioner did not have records of these customers, that would not mean that it could not discover who they were.[31]

[31] The petitioner could obtain the names of its customers during the prerationing heating season from the files of the local Ration Boards. A consumer applying for fuel oil at the start of rationing was required to state the amount of fuel oil obtained from each dealer with whom it dealt during the previous heating season and obtain each dealer's certification, or explain why that was not possible. See section 1394.5253 of Ration Order No. 11. The information revealed by these files could be followed up, if necessary, by communicating with the customer.

The rate of turn-over of customers of petitioner once its operations are restricted cannot at this time be known. Such turn-over means that old customers will return as well as depart. The treatment afforded customers is material as to the turn-over that may be expected. Petitioner, under the restrictive order, may bend its efforts to properly serving those customers who in the public interest are entitled to receive fuel oil from it.[32] Such efficient service by petitioner was not possible during the period when it was attempting wholesale expansion beyond its capacity at the expense of its competitors and the public by flouting the rationing rules. (See R. 43.) In the event that petitioner's turn-over proves excessive in spite of efficient efforts to retain its prerationing customers petitioner can always seek administrative modification of the order.

It is understandable that a suspension order will cause injury to petitioner. It has not, however, merited a less restricted role in the rationing program. The Hearing Administrator found numerous and flagrant violations which endanger the rationing program. Petitioner's failure to turn ration coupons in to its supplier, for example, was destructive of the controls instituted

[32] The general plan of distribution of fuel oil under rationing and wartime quota restrictions is along historical lines, with suppliers giving nondiscriminatory preference to their prerationing customers and dealers treating consumers in the same fashion.

by the Office of Price Administration to provide for the orderly flow of fuel oil to all parts of the country. Petitioner's supplier, Petrol Corporation, no more cooperative than petitioner itself, receiving no coupons, turned none in to the Control & Audit Section of the Rationing Branch of the Office of Price Administration. Petrol was suspended, the Hearing Administrator remarking:

> The successful operation of the rationing plan or system adopted is dependent upon the timely and uninterrupted "flow-back of ration evidence". This means that coupons or other evidences must accompany the transfer of fuel oil at each successive level from the consumer, through the dealer, to the primary supplier, who, in turn, must account monthly for his receipts and transfers of fuel oil within the limitation area during the preceding month (except transfers to other primary suppliers) to the Control & Audit Section of the Fuel Oil Rationing Branch, in Washington, submitting exchange certificates or a ration check to cover the transfers. Rationing to consumers cannot be enforced or controlled unless coupons or other evidences flow upstream to ultimately balance with the total amount of fuel oil transferred.

The harm to the public and the rationing system was the basis for administrative action

against petitioner. That the harm to petitioner might have been less if a different order had been entered is immaterial so long as the order issued is appropriate.

In fact it cannot be said that the suspension order is in any way unreasonable. The restriction of petitioner to customers serviced by it during the prerationing year (October 21, 1941, to October 21, 1942) approximates, as nearly as administratively feasible, the *kind* of business the petitioner was organized to manage before its expansion achieved through flouting ration rules. The kind of business petitioner had is not determined by the *amount* of fuel oil sold, as an isolated factor. Account must be taken of geographical distribution of customers, the number of consumers for whom petitioner must keep records and to whom it must make deliveries, the size of the sale to each customer, and total volume of sales. The suspension order itself must not put the onus of difficult enforcement upon public agencies; the petitioner has been the violator, not the public. There must be a simple check available to see that petitioner is complying.

The suspension order proceedings were based upon the conduct of petitioner during the 1942–1943 heating season. Petitioner notes (Brief, p. 19) that no violations in the present heating season have been claimed to exist at any stage of

the proceedings. These administrative proceedings, it should be remembered, commenced in August 1943, before the present heating season, by a formal statement of charges (R. 23–31) which petitioner had every right to believe would constitute the exclusive subject matter of the later proceedings. A contrary procedure would not have accorded due process. There is no basis for implying that further violations have not occurred, or are not likely to occur. On the contrary, the past record of petitioner indicates that it would have continued to violate in the absence of a suspension order. Nor does petitioner have any basis for implying that the Office of Price Administration delayed bringing proceedings once it had completed its investigation. The process of discovering violations is time-consuming and expensive. That is one reason why violating dealers must be suspended or restricted to the kind of business that they have the capacity to handle.

Nor can it be said that the suspension order is punishment because persons possibly untrustworthy, as gleaned from their conviction for some criminal offense, or their violation of some wartime restriction, are permitted to participate in the allocation system until they violate ration rules. The administrative desirability and feasibility of considering these factors for tests of

eligibility are questionable.[33] The standard for eligibility selected is a reasonable one, although some other system might possibly have been adopted.

B. *Congress knew that suspension orders were being issued as part of the allocation function, did nothing to alter the practice, and in fact affirmatively approved it*

1. By reenacting Section 2 (a) of the Priorities and Allocations Act, after that Section had been construed to authorize suspension orders, Congress ratified and confirmed the known administrative construction and practice

The analysis presented thus far has shown that the power to issue suspension orders is a necessary phase or attribute of the statutory power to allocate. Any doubt on this score was removed by the congressional reenactment of Section 2 (a) of the Priorities and Allocations Act after that Section had been construed to authorize the issuance of suspension orders.

The Priorities and Allocations Act became effective May 31, 1941. Ten months later Congress

[33] Petitioner itself attacks a further test of eligibility adopted by the Office of Price Administration and one much more closely related to the allocation process than any of the tests petitioner suggests, that of whether or not the dealer is exceeding the maximum ceiling price for the rationed commodity (Brief, pp. 35, 36).

passed the Second War Powers Act (March 27, 1942), Title III of which reenacted the language of Section 2 (a) of the earlier Act. Section 2 (a) (2) reads:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material *or of any facilities* for defense or for private account or for export, the President may allocate such material *or facilities* in such manner, *upon such conditions* and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. [Italics supplied.]

The only changes made in this section were the additions of the italicized words. "Facilities" were now included as well as "material," and the phrase "upon such conditions" was appended. Civil and criminal penalties were added by Section 2 (a) (5) and (6). Between the pertinent dates of May 31, 1941, and March 27, 1942, the Office of Production Management and its successor, the War Production Board, had issued thirteen suspension orders.[34] This exercise of the suspension order power by the Office of Production Management and the War Production Board was well known to the Congress which re-

[34] These orders were issued as follows: S–1, on October 15, 1941, 6 F. R. 5293; S–2, December 20, 1941, 6 F. R. 6647; S–3, December 22, 1941, 6 F. R. 6685; S–4, December 22, 1941, 6

enacted Section 2 (a) of the Priorities Act in Title III of the Second War Powers Act." In the Senate Hearings on the Second War Powers Act, Oscar Cox, General Counsel for the Office for Emergency Management, who was presenting the bill to the Committee on the Judiciary, brought the suspension order procedure expressly to the attention of the Committee:[35]

> The only penalty provided under the Vinson Act, the June 28, 1940, Act, is to cut off a man's supply or to requisition what he has under the Requisitioning Act.

It will be observed that Mr. Cox employed the word "penalty" in a loose sense, in recognition of the enforcement effects of the suspension order. Such loose references appear throughout the legislative history. If these references mean any-

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F. R. 6685; S–5, December 22, 1941, 6 F. R. 6686; S–6, December 22, 1941, 6 F. R. 6686; S–7, December 20, 1941, 6 F. R. 6648; S–8, February 10, 1942, 7 F. R. 945; S–9, February 10, 1942, 7 F. R. 946; S–10, February 3, 1942, 7 F. R. 750; S–11, February 6, 1942, 7 F. R. 902; S–12, February 10, 1942, 7 F. R. 946; S–13, March 21, 1942, 7 F. R. 2236.

[34] As early as August 14, 1941, David Ginsburg, General Counsel of the Office of Price Administration, in testifying on the Emergency Price Control Bill, replied to a question concerning the sanctions for priority enforcement by pointing out that "Mr. Stettinius * * * can cut off that man from further materials." H. Hearings, Committee on Banking and Currency, on H. R. 5479, 77th Cong., 1st Sess., p. 589.

[35] Statements in Executive Session on S. 2208, 77th Cong., 2d Sess., Jan. 19, 1942, p. 20.

thing it is that Congress, by reenactment of the statute with full knowledge of the penal effect of suspension orders, nonetheless approved and ratified the administrative practice of issuing them. Congress was, of course, free to approve the administrative practice, irrespective of its penal or remedial nature, and has done so. "Penalty," being a word of uncertain meaning, has not been held necessarily to carry with it legal consequences, even though used by Congress itself. Thus the double damages section of the Fair Labor Standards Act [37] was held by this Court in *Overnight Motor Transportation Co.* v. *Missel,* 316 U. S. 572, 583, to be "not a penalty or punishment," although Congress has headed the section: "Penalties; civil and criminal liability." Cf. *Divine* v. *Levy,* 45 F. Supp. 49 (W. D. La.).

The Senate Committee Report likewise recognized the existence of the administrative suspension order sanction by stating: [38]

> The Attorney General presented to the committee the need for adequate machinery to enforce the priorities law. He reported that violations of priorities and allocations orders are widespread. He pointed out that there is a real need for penal provisions and the power to enjoin violations of priorities orders. Administrative sanctions, although highly impor-

[37] 29 U. S. C. 216 (b).

[38] Senate Rep. 989, 77th Cong., 2d sess.

tant, do not provide a proper penalty in every case.

The House of Representatives also had notice of the suspension order procedure. The Attorney General made the following statement (H. Hearings before Committee on the Judiciary, 77th Cong., 2d sess., on S. 2208, January 30, 1942, pp. 10–11):

> It is true that there are various administrative sanctions available to the Office of Production Management. Fuel and power might be cut off to a factory violating the priorities order as was done during the World War on several occasions. But administrative sanctions, although highly important, do not provide an adequate remedy in all cases. For example, at a time when airplane production is vitally needed it would not facilitate war production to curtail the supply of aluminum to an airplane company and thus close the plant.
>
> The civil and criminal remedies provided are intended to supply the means whereby priorities orders and allocations can be enforced *when administrative sanctions are not appropriate.* [Italics supplied.]

Congressman McLaughlin, from the Committee on the Judiciary, the sponsor of the bill, in presenting Title III to the House of Representatives, said:[39]

[39] 88 Cong. Rec., Feb. 24, 1942, p. 1586.

> * * * Under the present law various administrative provisions affecting priorities are available to the Office of Production Management. These are in the way of sanctions, such as cutting off power, and the withdrawing from a factory of materials, such as aluminum.

It is clear from the legislative history above quoted that the criminal and civil penalties added by Section 2 (a) (5) and (6) were not contemplated as substitutes for the suspension order but as supplementary compliance measures. The sponsors of the bill came before the Congress to obtain these civil and criminal sanctions because, as was pointed out to Congress, the suspension order oftentimes cannot suitably be employed.[*]

The congressional reenactment of the statutory provision, with knowledge of its construction by the executive authority responsible for its administration and enforcement, constitutes a legislative ratification and adoption of the administration construction. *Nagle* v. *Loi Hoa,* 275 U. S. 475; *Copper Queen Consolidated Mining Co.* v. *Territorial Board of Equalization,* 206 U. S. 474; *United States* v. *Cerecedo Hermanos y Compania,*

[*] The original draft of the Second War Powers Act was prepared by the Department of Justice. See Statement of Attorney General Biddle, H. Hearings before Committee on the Judiciary, 77th Cong., 2d sess., on S. 2208, Jan. 30, 1942, p. 8. Title III was proposed to the Department of Justice by Donald Nelson, Chairman of the War Production Board, *Ibid.*, p. 10.

209 U. S. 337; *Komada and Co.* v. *United States*, 215 U. S. 392; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U. S. 269; *Brewster* v. *Gage*, 280 U. S. 327; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *Burnet v. Brooks*, 288 U. S. 378; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; *Old Mission Co.* v. *Helvering*, 293 U. S. 289; *Hartley* v. *Com'r of Internal Revenue*, 295 U. S. 216; *Hassett* v. *Welch*, 303 U. S. 303."[41]

While an automatic or mechanical application of the reenactment rule may be thought to be unrealistic where there is no showing that Congress had knowledge of the administrative interpretation which it is held to have ratified by reenactment, this criticism is in no way applicable to the present situation. As shown by the legislative sources referred to above, and as is evident from the great public significance of the

[41] The reenactment rule may be applied where there has been but a single reenactment. Thus in *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, where the Court refused to apply the reenactment principle to an interpretation which had been abandoned prior to enactment of the later Act, the Court, in the course of its opinion stated (p. 99), with reference to an administrative interpretation which had *not* been abandoned prior to reenactment, that "it may be assumed that that administrative construction received legislative approval by the reenactment of the statutory provision in the 1924 Act, without material change. Cf. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466."

administrative action concerned, Congress knew of the administrative construction of Section 2 (a) at the time it reenacted the language of that Section in the Second War Powers Act. Indeed, the basic rationing directive, War Production Board Directive No. 1, issued January 24, 1942, two months prior to the passage of the Second War Powers Act, spelled out the administrative construction (see p. 4, note 3, *supra*). Congress could not have been unaware of the terms of this widely publicized and discussed delegation of rationing authority. The case presented is thus one of the strongest possible cases for application of the reenactment principle, and the arguments advanced in opposition to application of that principle where in fact the administrative construction was obscure and unimportant, are wholly irrelevant.

It follows therefore that the reenactment of Section 2 (a) of the Priorities Act, after the administrative authorities had construed the section as authorizing the issuance of suspension orders, constitutes, in the first place, a controlling legislative approval of the well-known administrative construction and practice, and indicates that Congress regarded the authority as comprehended within the original statutory grant of power. In the second place, it shows a ratification of the known administrative practice, even

assuming *arguendo* that there had been no prior expressed or implied legislative grant of authority. *Hirabayashi* v. *United States*, 320 U. S. 81; *Brooks* v. *Dewar*, 313 U. S. 354; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 300–303; *Silas Mason Co.* v. *Tax Commmission*, 302 U. S. 186, 208; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 146–148; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *United States* v. *Heinszen & Company*, 206 U. S. 370, 382, 384; *Wells* v. *Nickles*, 104 U. S. 444, 447; *Prize Cases*, 2 Black 635, 671.

2. The legislative history of the Federal Reports Act of 1942 demonstrates that the Congress recognized the suspension-order practice

On December 24, 1942, the Federal Reports Act of 1942 [a] entitled, "an Act to coordinate Federal reporting services, to eliminate duplication and reduce the cost of such services, and to minimize the burdens of furnishing information to Federal agencies," was approved. Prior to and at the time of the consideration of this legislation, Congress had been fully advised of the use by the Office of Price Administration of the suspension order procedure. Actively participating in the debates on the bill which became the Federal Reports Act was Representative Howard W. Smith, Chairman of the Select Committee to Investigate Executive Agencies.

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[a] 56 Stat. 1078, 5 U. S. C. (Supp. II) 139 et seq.

The discussion on the floor of the House of Representatives relating to the provisions of the bill which dealt with the furnishing of information by persons to government agencies demonstrates that Congress not only approved but specifically authorized the use of the suspension order power by the Office of Price Administration to withdraw from any person the use of any material with respect to which a particular type of information was sought and refused. The legislative history unmistakably indicates that a limited provision, proposed by Representative Smith, was intended to forbid the use of suspension orders only against persons refusing requested information which would not reveal the facts upon which receipt of a rationed commodity was legally conditioned. Mr. Smith presented his amendment from the floor.[48]

> Mr. SMITH of Virginia. Mr. Speaker, I offer an amendment which I send to the Clerk's desk.

The Clerk read as follows:

> Amendment offered by Mr. Smith of Virginia: After line 11, page 7, insert a new section 8 as follows:
>
> "Any person failing to furnish information required by any such agency shall be subject to such penalties as are specifically prescribed by law and no other

[48] 88 Cong. Rec., Nov. 27, 1942, p. 9164.

> penalty shall be imposed, either by way of fine, or imprisonment, or by the withdrawal or denial of any right, privilege, priority, allotment, or immunity, afforded to any other person."

Thereafter the bill as so amended went to conference and the conferees added to the Smith Amendment the following pertinent language.[44]

> except when the right, privilege, priority, allotment, or immunity, is legally conditioned on facts which would be revealed by the information requested.

When the bill came back to the House for consideration the following discussion occurred (*ibid.*):

> Mr. SMITH of Virginia. I would like to inquire of the gentleman from Mississippi as to the amendment placed by the conference committee to the amendment which I offered and which was adopted by the House. That amendment, which was adopted by the House, provided that no extra legal penalties should be imposed upon any citizen for failure to answer any of these questionnaires. The Senate has added some rather complicated language to that amendment. I would like to be sure, and I think the House would like to be sure that this language does not affect or destroy the fundamental purpose of the House amendment. * * *

[44] 88 Cong. Rec., Dec. 10, 1942, p. 9435.

Mr. WHITTINGTON. I may say in answer to the question propounded by the gentleman from Virginia that the conference report contains substantially the amendment that he proposed in the House and that was adopted by the House. The report of the managers on the part of the House shows it was the purpose to retain the substantial provisions of that amendment to prohibit the very things the gentleman's amendment undertook to condemn. There is clarifying language only in the conference report, and it was believed that the clarifying language was necessary in order to make effective the purpose the House and the gentleman had in mind in adopting the amendment proposed by him.

To answer specifically: The language of his amendment, it was thought by the conferees, might encourage the citizen who was obstinate and refused in any way or in any degree to cooperate; for instance, in the rationing of sugar if the citizen in applying for his allotment were to refuse to answer, and the chiseler were to refuse to disclose, that he had sugar on hand, there would be no way to deny him his allotment of sugar. The purpose of the amendment was to reach such an illustrative case as I have just mentioned.

Mr. SMITH of Virginia. That was the only purpose of the amendment.

Mr. WHITTINGTON. That was the purpose of the amendment.

Mr. SMITH of Virginia. Let us suppose a person applies for a sugar card and refused to answer the questions upon which he is entitled to the issuance of that card, then under that amendment the O. P. A. *can quite properly say he can have no sugar.*

Mr. WHITTINGTON. *Otherwise we would absolutely hamstring the Price Administration.*

Mr. SMITH of Virginia. *I am in thorough accord with that;* but most certainly it should not give the Administration the power to deny a man sugar because he does not answer some question on an application for gasoline. For instance, I had this example brought to my attention: A transportation company was asked voluntarily to agree to something that this particular agency could not require them to do and which would very seriously have handicapped that transportation company. They said: "No; we will not voluntarily agree to do that."

The answer was: "Well, if you do not voluntarily agree to that we will see that you do not get any tires for your automobiles."

That is the kind of thing I think this Congress does not want to condone being done by the executive department. [Italics supplied.]

Congressman Hinshaw then remarked that he had inquired of the Office of Price Administra-

tion as to "what authority of law there might be by which the Administrator of the Office of Price Administration could say that he could refuse to issue gasoline rationing tickets to anybody who owned more than five tires." The Congressman inserted in the Record a copy of Administrator Henderson's reply which first referred to the basic authority granted in Section 2 (a) (2) of the Priorities and Allocations Act, as embodied in Title III of the Second War Powers Act, and then went on to say:

> In order to insure that adequate supplies of tires be made available at the appropriate time and in the appropriate manner for uses to carry on the war effort, it is imperative that the Government secure possession and control over all tires in excess of five, which are normally needed to operate a car. Only the Government is in a position to effect an effective and equitable allocation of such tires. It seems clear, therefore, that the acquisition of such tires and their distribution are part of the allocation program authorized by the Priorities and Allocations Act. Conditioning gasoline rationing upon the turning over of excess tires to the Government is appropriate for this purpose, because the objective of both gasoline rationing and tire rationing is the proper allocation of transportation facilities.

Section 8 of the Federal Reports Act,[45] as finally passed, reads:

> Any person failing to furnish information required by any such agency shall be subject to such penalties as are specifically prescribed by law, and no other penalty shall be imposed either by way of fine or imprisonment or by the withdrawal or denial of any right, privilege, priority, allotment, or immunity, except when the right, privilege, priority, allotment, or immunity, is legally conditioned on facts which would be revealed by the information requested.

This legislative history makes it clear that Congress possessed full information as to what suspension orders were, and how, and by what authority, they were being used.[46] In the light of this knowledge, Congress specifically legislated on the subject of suspension orders in Section 8 of the Federal Reports Act. This section forbade the use of such orders in a special type of situation, and by express exception recognized the

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[45] 5 U. S. C. (Supp. II), Sec. 139f.

[46] On November 15, 1943, Congressman Smith's Select Committee issued its Second Intermediate Report (H. Rep. No. 862, 78th Cong., 1st sess.). This Report condemned suspension orders as unauthorized "penalties," labeled the contentions of John Lord O'Brian, General Counsel of the War Production Board, set forth in a letter to the Chairman, as "ridiculous," and relied on the decision of the lower court in the *Wilemon* case, later reversed, *supra*, p. 16, note 13.

authority for their use in other cases. This has a twofold significance: (1) It shows that Congress knew how to find words to accomplish its purpose in a situation where it desired to forbid suspension orders. This in itself is the clearest congressional recognition that the power exists where its exercise is not prohibited. (2) It shows that Congress accepted and approved the use of suspension orders except in the special area of the prohibition.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator,
FLEMING JAMES, JR.,
Director, Litigation Division,
DAVID LONDON,
HARRY SHNIDERMAN,
Office of Price Administration.

APRIL 1944.

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SUPREME COURT OF THE UNITED STATES.

No. 793.—October Term, 1943.

L. P. Steuart & Bro., Inc., Petitioner, vs. Chester Bowles, Administrator, Office of Price Administration, et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[May 22, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

Sec. 2(a)(2) of Title III of the Second War Powers Act (56 Stat. 178, 50 U. S. C. App. (Supp. III), § 633) provides in part:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

By § 2(a)(8) of the Act the President is granted authority to exercise that power "through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe". That authority, so far as material here, was delegated to the Office of Price Administration,[1] which promulgated Ration Order No. 11, effective October 22, 1942, providing for the rationing of fuel oil.[2] That order recited the now familiar facts concerning the then critical and acute shortage of fuel oil and other petroleum products in the eastern states due to the great war activity. It stated that it was "essential to guarantee the continued availability of adequate supplies of fuel oil for military and naval use and for industrial and agricultural operations" and that the "reduction of demand to the available supply is sought to be achieved largely by a curtailment of the use of fuel oil for heating premises and for hot water, virtually the only classes of uses which can be uniformly reduced

[1] Executive Order No. 9125, 7 Fed. Reg. 2719; War Production Board, Supplementary Directive 1-0, Oct. 16, 1942, 7 Fed. Reg. 8418.

[2] 7 Fed. Reg. 8480.

without directly impeding the war effort."[3] The order inaugurated "a system of rationing control" deemed necessary in order "to provide for equitable distribution of fuel oil in the areas of shortage."[4] Fuel oil rations for heat and for hot water were provided. Machinery was established for the regulation of the flow of fuel oil from suppliers to consumers. Only a few of those regulations are relevant here. Transfers of fuel oil to consumers were allowed only in exchange for ration coupons.[5] A dealer obtaining fuel oil from his supplier was generally required to surrender ration coupons within five days after the transfer.[6] Dealers were required, with exceptions not material here, to keep records of sales to consumers showing their names and addresses, the date and amount of the transfer, and the coupons detached.[7] Provision was also made for "suspension orders" as follows:[8]

> "Any person who violates Ration Order No. 11 may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

On December 31, 1943, a suspension order was issued against petitioner, a retail dealer in fuel oil in the District of Columbia. It was found that petitioner had obtained large quantities of fuel oil from its supplier without surrendering any ration coupons. It was found that petitioner had delivered many thousands of gallons of fuel oil to consumers without receiving ration coupons in exchange;[9] and that in some instances petitioner delivered fuel

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3 *Id.*, p. 8480.

4 *Id.*, p. 8480. Ration Order No. 11 initiated rationing of fuel oil in thirty eastern, southeastern, and midwestern states and in the District of Columbia.

5 § 1394.5652.

6 §§ 1394.5707, 1394.5708.

7 § 1394.5656.

8 § 1394.5803. And see 8 Fed. Reg. 2720.
The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order 46, 8 Fed. Reg. 1771. It also adopted, Feb. 6, 1943, Procedural Regulation No. 4, which prescribed the procedure to be used in the issuance of rationing suspension orders. 8 Fed. Reg. 1744. And see 9 Fed. Reg. 2558 for the revision of this regulation, issued May. 6, 1944.

9 Some 328,000 gallons according to OPA, around 181,000 gallons on petitioner's computation.

oil to consumers without receipt of valid ration coupons in exchange.[10] Petitioner was also found to have failed to keep the required records showing its transfers of fuel oil to consumers. The suspension order prohibited petitioner from receiving fuel oil for resale or transfer to any consumer for the period from January 15, 1944 to December 31, 1944, the date when the Second War Powers Act expires. The order provided, however, that if petitioner furnished the Office of Price Administration with a list of consumers to whom it had sold fuel oil from October 21, 1941, to October 21, 1942, and if it surrendered all void ration coupons in its possession, it might transfer fuel oil to any consumer to whom it had transferred fuel oil during the year subsequent to October 21, 1941[11] and receive fuel oil sufficient for that purpose. The order finally provided that if the Petroleum Administrator for War[12] should certify that the fuel oil needs of the District of Columbia could not be met by the supplies and the facilities of other suppliers and dealers in the area and that it was therefore essential to the welfare of the community that the provisions of the suspension order be modified, the restrictions might be wholly or partly removed.[13] The suspension order was issued after notice and hearings as provided in the regulations which govern the procedure in such cases.[14]

The present suit was brought in the District Court for the District of Columbia to enjoin the enforcement of the suspension order. A temporary restraining order was issued. Respondents moved for summary judgment. That motion was granted and the complaint was dismissed. On the appeal that judgment was affirmed. 140 F. 2d 703. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the rationing regulations.

The sole question presented by this case is whether the power of the President under § 2(a)(2) of Title III of the Second War

[10] The OPA Hearing Administrator found "The record is replete with proof that respondent did commit, with reference to transfers to consumers, practically every sort of violation known to the regulations—making deliveries for expired coupons, unmatured coupons, no coupons at all and making emergency deliveries in excess of the quantities permitted."

[11] Ration Order No. 11 became effective October 22, 1942.

[12] Established December 2, 1942, by Executive Order No. 9276, 7 Fed. Reg. 10091.

[13] The suspension order also provided for an accounting by petitioner of its fuel oil transactions since October 22, 1942.

[14] Procedural Regulation No. 4, *supra*, note 8.

Powers Act to "allocate" materials includes the power to issue suspension orders against retailers and to withhold rationed materials from them where it is established they have acquired and distributed the rationed materials in violation of the ration regulations.

We state the question that narrowly because of the posture of the case as it reaches us. The constitutional authority of Congress to authorize as a war emergency measure the allocation or rationing of materials is not challenged. No question of delegation of authority is present. It is assumed, on petitioner's concession, that the President has validly delegated to the Office of Price Administration whatever authority he has under § 2(a)(2) of Title III of the Act. And no question is raised, like those involved in *Yakus* v. *United States*, 321 U. S. ——, and *Bowles* v. *Willingham*, 321 U. S. ——, concerning the authority of Congress to delegate to the President in this way the power to allocate materials. No contention is made that petitioner was deprived of fuel oil without a hearing and an opportunity to defend. Nor is it argued that, although the power to issue suspension orders exists, that power was abused in this instance, so as to give rise to judicial review, and the limits of the authority exceeded by the specific provisions of the order which is before us. And finally, no challenge is made of the findings which underlie this suspension order.[15]

The argument, rather, is that the authority to "allocate" materials does not include the power to issue suspension orders; and that no such power will be implied since suspension orders are penalties to which persons will not be subjected unless the statute plainly imposes them. *See Tiffany* v. *National Bank*, 18 Wall. 409, 410; *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, 362; *Wallace* v. *Cutten*, 298 U. S. 229, 237. In that connection it is pointed out that Congress provided criminal and civil sanctions for violations of Title III of the Act. By § 2(a)(5) any person who wilfully violates those provisions of the Act or any rule, regulation or order promulgated thereunder is guilty of a misdemeanor and subject to fine and imprisonment. By § 2(a)(6) federal courts have power, among others, to enjoin any violation of those provisions of the Act or any rule, regulation or order thereunder.

[15] The Government has conceded that there may be judicial review of suspension orders.

It is therefore contended that when violations of regulations under the Act are used as the basis for withholding rationed materials from persons, sanctions for law enforcement are created by administrative fiat contrary to the Act in question and contrary to constitutional requirements.

We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Wallace* v. *Cutten, supra.* Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record.

The problem of the scarcity of materials is often acute and critical in a great war effort such as the present one. Whether the difficulty be transportation or production, there is apt to be an insufficient supply to meet essential civilian needs after military and industrial requirements have been satisfied. Thus without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. The burdens are thus shared equally and limited supplies are utilized for the benefit of the greatest number. But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. By disregarding quotas prescribed for each householder and by giving some more than the allotted share they would defeat the objectives of rationing and destroy any program of allocation. These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. If the needs of consumers are to be met and the consumer allocations are to be filled, prudence might well dictate the avoidance or discard of such inefficient and unreliable means of distribution of a scarce and vital commodity. Certainly we could not say that the President would lack the power under

this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business. Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil.

If petitioner established that he was eliminated as a dealer or that his quota was cut down for reasons not relevant to allocation or efficient distribution of fuel oil, quite different considerations would be presented. But we can make no such assumption here. The suspension order rests on findings of serious violations repeatedly made. These violations were obviously germane to the problem of allocation of fuel oil. For they indicated that a scarce and vital commodity was being distributed in an inefficient, inequitable and wasteful way. The character of the violations thus negatives the charge that the suspension order was designed to punish petitioner rather than to protect the distribution system and the interests of conservation. Moreover, there is the following finding in support of the limitation on the number of customers which petitioner may hereafter service:

> "We have no way of knowing how many customers the respondent corporation can serve while at the same time faithfully observing the rationing regulations. But we do know from its clearly established violations from the very inception of fuel-oil rationing that the number it then served approached the upper limit of its capacity since the fact is clear that it did not (whether it would not or could not) thereafter both service this number and simultaneously comply with the rationing regulations. Additional customers, then, clearly impose a burden which the respondent cannot bear."

None of the findings is challenged here. Taken at their face value, as they must be, they refute the suggestion that the order was based on considerations not relevant to the problem of alloca-

tion. They sustain the conclusion that in restricting petitioner's quota the Office of Price Administration was doing no more than protecting a community against distribution which measured by rationing standards was inequitable, unfair, and inefficient. If the power to "allocate" did not embrace that power it would be feeble power indeed.

What we have said disposes of the argument that if petitioner has violated Ration Order No. 11 the only recourse of the government is to proceed under § 2(a)(5) or § 2(a)(6) which provide criminal and civil sanctions. Those remedies are sanctions for the power to "allocate". They hardly subtract from that power. Yet they would be allowed to do just that if it were held that violations by middlemen of the ration orders and regulations could never be the basis of reallocation of fuel oil into more reliable channels of distribution.

It is finally pointed out that Congress has seldom used the licensing power[16] and that that power, when used, has been employed sparingly. Thus one of the sanctions of the Emergency Price Control Act of 1942 (56 Stat. 33, 50 U. S. C. App. (Supp. III) § 925) is the power to revoke licenses for violations of maximum prices or rents. § 205(f). That power may be utilized only in judicial proceedings; and licenses may be suspended only for limited periods. § 205(f)(2). That consideration would be germane to the present problem if Congress had implemented the allocation procedure with a licensing system. Then the question might arise whether revocation of the license rather than the reallocation of materials by administrative action was the appropriate procedure in case of violations. Congress, however, did not adopt the licensing system when it came to rationing. And the failure to do so is hardly a reason for saying that the power to "allocate" is less replete than a reading of the Act fairly permits.

Affirmed.

Mr. Justice ROBERTS dissents.

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[16] See § 5 of the Act of August 10, 1917, 40 Stat. 276, 277.